

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY M. KENDRICKS,

Defendant-Appellant.

UNPUBLISHED

July 30, 1999

No. 203319

Recorder's Court

LC No. 96-006555

Before: Gribbs, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive terms of two years' imprisonment for the felony-firearm conviction, and mandatory life imprisonment for the first-degree murder conviction. We affirm.

Defendant first argues that the prosecutor committed misconduct during opening statement and closing argument by stating that premeditation and deliberation could take place in one second. We disagree. Defendant failed to object to the arguments of the prosecutor that he now alleges were improper; therefore, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Viewing the prosecutor's comments in context, the prosecutor correctly explained that premeditation and deliberation merely require that the interval between thought and action should be long enough for reflection, but that that interval is incapable of exact determination. See *People v Glover*, 154 Mich App 22, 28-29; 397 NW2d 199 (1986). Accordingly, we conclude that defendant was not denied a fair and impartial trial. Failure to further review this unpreserved issue would not result in a miscarriage of justice.

Defendant next argues that he should be granted a new trial because he received ineffective assistance of counsel. We disagree. Defendant moved for an evidentiary hearing on this issue and a *Ginther*¹ hearing was held; therefore, this issue has been properly preserved for appellate review. To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that under an objective standard of reasonableness counsel made an error so serious that counsel was not functioning as an attorney guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must be prejudicial to the defendant and the defendant must overcome the presumption that the challenged action is sound trial strategy. *Id* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant argues that defense counsel was ineffective for failing to convey a plea offer for second-degree murder with a sentencing recommendation of twenty-five to forty years' imprisonment. We disagree. After considering the testimony at the *Ginther* hearing, the trial court found that the plea offer was communicated to defendant and defendant declined the offer. We find that defendant failed to overcome the presumption that he received effective assistance of counsel at trial.

Defendant also argues that defense counsel was ineffective for failing to object to remarks made by the prosecutor regarding premeditation during opening statement and closing argument and failing to request the trial court to instruct the jury that the prosecutor's statements regarding premeditation were erroneous. We disagree. A defense counsel is not required to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Because remarks of the prosecutor did not deny defendant a fair and impartial trial, we conclude that defense counsel was not ineffective for failing to object or request a curative instruction. *Id*.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael R. Smolenski
/s/ Hilda R. Gage

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).